

Nos. 01-35472, 01-35476

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KOOTENAI TRIBE OF IDAHO, et al.,
Plaintiffs-Appellees,

v.

ANN VENEMAN, in her official capacity as Secretary of Agriculture, et al.,
Defendants,

and

FOREST SERVICE EMPLOYEES FOR ENVIRONMENTAL ETHICS,
Defendant-Intervenor,

and

IDAHO CONSERVATION LEAGUE, et al.,
Defendant-Intervenor-Appellants.

STATE OF IDAHO, *ex rel.* DIRK KEMPTHORNE, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES FOREST SERVICE, et al.,
Defendants,

and

IDAHO CONSERVATION LEAGUE, et al.,
Defendant-Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF OF AMICUS CURIAE, MONTANA ATTORNEY GENERAL, MIKE McGRATH
SUPPORTING APPELLANTS, IDAHO CONSERVATION LEAGUE, et al., IN
SUPPORT OF REVERSAL OF THE DECISIONS BELOW & VACATING THE
DISTRICT COURT'S PRELIMINARY INJUNCTION

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INTRODUCTION

The Montana Attorney General, as *amicus curiae*, contests the lower court's finding that the public process leading up to promulgation of the Roadless Area Conservation Rule¹ was "grossly inadequate." Kootenai Tribe v. Veneman, No. CV01-10-N-EJL, slip op. at 18 (D. Idaho April 5, 2001); Idaho v. U.S. Forest Serv., No. CV01-11-N-EJL, slip op. at 15 (D. Idaho April 5, 2001). In fact, the Forest Service went well beyond its statutory duty to involve the public in development of roadless area protections. In Montana alone, the Forest Service held 34 public meetings, not only in large cities such as Billings and Kalispell, but also in very small communities such as Plains and Divide, which are closest to roadless areas impacted by the Rule.²

The public turn-out was impressive. In all, 17,429 Montanans participated in the NEPA process, and of those commenting, 11,654 favored even stronger roadless area protections than those proposed in the Forest

¹ 36 C.F.R. §§ 294.12-13.

² For dates and locations of all public meetings in Montana, see Roadless Area Conservation, <http://www.roadless.fs.fed.us/states/mt/meeting3.shtml> (scoping meetings); <http://www.roadless.fs.fed.us/states/mt/meeting4.shtml> (Draft EIS meetings).

Service's draft environmental impact statement ("Draft EIS").³ Ultimately, the Forest Service promulgated a final rule that responded to overwhelming public support - both nationally and in Montana - for a national prohibition on roadbuilding and logging on roadless National Forest lands. Insofar as the district court's grant of a preliminary injunction rested on its finding that plaintiffs were likely to succeed on the merits of their NEPA public participation claims, that decision should be overturned.

INTEREST OF AMICUS CURIAE

The Montana Attorney General, Mike McGrath, is the State's chief legal officer and also one of five members of the State Land Board, which governs the use of 5.2 million acres of state-owned land. In his official capacity, the Attorney General has a significant interest in the management of roadless lands within Montana. With 6,397,000 inventoried roadless acres, Montana has the third largest total area affected by the Roadless Area Conservation Rule. Under Montana law, the Attorney General has the common law authority to appear in all actions affecting the public interest. State ex re. Olsen v Public Service Commission, 129 Mont. 105, 115, 283 P2d 594, 599 (1955).

³ A complete state-by-state analysis of public comment is attached as Exhibit 1 to Motion of Appellants Idaho Conservation League, et al. to Expedite

ARGUMENT

The district court's finding that the public-comment process was inadequate is belied by the fact that 1.2 million Americans, many Montanans among them, were able to participate in the development of the Roadless Rule. Both at the scoping stage and after the Draft EIS was issued, the Forest Service actively sought and responded to public input.

I. OPPORTUNITY FOR PUBLIC COMMENT AT THE SCOPING STAGE WAS MORE THAN ADEQUATE

The NEPA scoping process is governed by 40 C.F.R. § 1501.7, which requires federal agencies to invite public participation in “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to the proposed action.” *Id.* In this case, the Forest Service published a Notice of Intent to Prepare a Draft EIS, 64 Fed. Reg. 56,306 (Oct. 19, 1999), addressing long-term protection for Forest Service roadless areas. Over the next two months, the agency held 187 public meetings, attended by 16,000 people, and received more than 517,000 comments on the idea. In Montana, the Forest Service held ten public scoping meetings, one for each National Forest in Montana.⁴ Given

Appeals and to Consolidate Cases for Purposes of Appeal (filed May 16, 2001). A summary of comments is attached as Exhibit 1.

⁴ Scoping meetings were held across the state in Missoula, Great Falls, Libby, Hamilton, Kalispell, Billings, Helena, Bozeman, and Dillon. See

that Council for Environmental Quality (CEQ) regulations did not require the Forest Service to hold *any* meetings, this statewide effort to involve local citizens in the earliest stages of the NEPA process was more than adequate. 40 C.F.R. § 1506.6.

II. THE FOREST SERVICE'S PROVISION FOR PUBLIC PARTICIPATION IN THE EIS PROCESS WAS EXEMPLARY

After the Forest Service issued its Draft EIS, the Forest Service held over 400 public meetings nationwide, including 24 meetings across the state of Montana. From the largest cities to the smallest rural communities, citizens in Montana had an opportunity to make their opinions heard on the proposed roadless policy.⁵ And thousands of people in Montana *were* heard. Well over 17,000 Montanans provided comments.

Ultimately, 67% of commenters in Montana favored even stronger protections for roadless areas than those proposed in the Draft EIS.⁶ The

Roadless Area Conservation, <http://www.roadless.fs.fed.us/states/mt/meeting3.shtml>, a copy of which is attached as Exhibit 2.

⁵ Draft EIS meetings were held in Wisdom, Butte, Divide, Dillon, Deer Lodge, Philipsburg, Boulder, Whitehall, Sheridan, Ennis, Hamilton, Billings, Kalispell, Bozeman, Helena, Libby, Great Falls, White Sulphur Springs, Missoula, and Plains. See Roadless Area Conservation, <http://www.roadless.fs.fed.us/states/mt/meeting4.shtml>, a copy of which is attached as Exhibit 3.

⁶ Nationally, 96% of commenters favored stronger protections than those proposed in the Draft EIS.

final Roadless Rule responded to a clear majority of public commenters, both nationally and in Montana, by further strengthening roadless area protections. Thus, contrary to the district court's findings, the Rule was not the foregone conclusion of a "pre-determined" decision-making process. Kootenai Tribe v. Veneman, No. CV01-10-N-EJL, slip op. at 18 (D. Idaho April 5, 2001); Idaho v. U.S. Forest Serv., No. CV01-11-N-EJL, slip op. at 15 (D. Idaho April 5, 2001). The Roadless Rule is rather the product of public rulemaking at its most effective.

CONCLUSION

For the foregoing reasons, The Montana Attorney General, as *amicus curiae*, respectfully requests that this Court reverse the decisions below and vacate the district court's issuance of preliminary injunctions.

Respectfully submitted this 7th day of June, 2001,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of June, 2001, I caused copies of ___ to be served by United States first-class mail, postage prepaid, upon the following:

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